Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20054

In the Matter of	)	
	)	
Policy and Rules Concerning the	)	CC Docket 96-61
Interstate, Interexchange Marketplace	)	

COMMENTS OF
MFS COMMUNICATIONS COMPANY, INC.

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Dated: April 25, 1996

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MFS Communications Company Inc. ("MFS"), by its undersigned counsel and pursuant to Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") rules, hereby respectfully submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") regarding the interstate, interexchange marketplace.[1/]

INTRODUCTION AND SUMMARY

MFS supports the Commission's efforts to promote the development of competition in all market segments of the telecommunications industry, as mandated by the Telecommunications Act of 1996.[2/] However, MFS believes that the FCC's proposed policy of *mandatory* detariffing for all non-dominant providers of interstate, interexchange service is neither authorized by Congress, nor in the public interest. MFS respectfully suggests that, rather than adopting a policy of mandatory detariffing, the Commission should implement a policy of permissive

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1/ *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96061, FCC 96-123 (Mar. 25, 1996) ("*NPRM*").

2/ Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996) ("*Telecommunications Act*").

tariffing where non-dominant service providers are allowed to file tariffs. A policy of permissive tariffing promotes the public interest for at least four reasons:

1. Permissive tariffing reduces the administrative burden on the Commission by reducing the volume of tariffs filed with the Commission.

2. Permissive tariffing reduces transaction costs and encourages market participation by smaller carriers by allowing them to file tariffs as standard form contracts in lieu of developing, enforcing and tracking a system of individual customer contracts.

3. Permissive tariffing allows carriers to be more flexible and responsive to the market than would be true if carriers were required to enter into millions of individual customer contracts by a policy of mandatory detariffing. Carriers that file tariffs can quickly respond to market price changes by changing their tariffed prices, and still have the flexibility of offering contracts to customers as the market demands.

4. Permissive tariffing promotes competition by making available information about prices, terms and conditions to both customers and competitors. In a competitive market, all firms act as market price takers, but obviously, firms cannot act as price takers if they do not know, and cannot determine, the market price.

For these reasons, MFS contends that the Commission should continue to permit, on an optional basis, tariff filings for all non-dominant providers of interexchange service.

I. MANDATORY DETARRIFING IS NOT AUTHORIZED BY THE ACT

Section 10(a) of the Telecommunications Act authorizes the Commission to forbear from enforcing the tariff filing requirements set forth in Section 203 of the Act[3/] *if* the Commission

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[3/] 47 U.S.C. § 203.

determines that:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in conjunction with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; *and*

(3) detariffing from applying such provision or regulation is consistent with the public interest.[4/]

If these requirements are met, the language of the Telecommunications Act authorizes the Commission to forebear or refrain from imposing a Section 203 requirement,[5/] but arguably does not authorize the Commission to *forbid* carriers from filing tariffs. Moreover, a policy of mandatory detariffing is not consistent with the public interest, and so fails to meet the basic statutory prerequisite for forbearance.

A. The Language of the Act Does not Authorize the Commission to Prohibit Tariff Filings

While the Telecommunications Act permits the Commission to forbear from applying any of the Section 203 requirements, it does not authorize the Commission to *prohibit* such Section 203 tariff filings. Nowhere in Section 10(a), or elsewhere in the Telecommunications Act, did Congress state that non-dominant IXCs may not file tariffs, or that the Commission may no longer accept tariff filings. Rather, Congress permitted the Commission *to refrain from continuing to impose tariffing requirements*, as long as the Commission has determined that the test set forth in Section 10(a) was satisfied. Section 10(a) states that "[t]he Commission shall

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4/ Telecommunications Act at § 401 (adding § 10(a)) (emphasis added).

5/ *Id.*

forbear from applying any regulation or provision of this Act . . . if the Commission determines that [the three requirements set forth in 10(a)(1)-(3) have been met.]"[6/] The term "forbear" is commonly defined as "refraining from doing something that one has a legal right to do."[7/] This term thus has a permissive, rather than absolute or mandatory quality to it. Therefore, the term "forbear," as used in the Act, clearly does not contemplate imposing an absolute prohibition on tariff filings, as the Commission apparently has interpreted this section, but instead, signifies providing non-dominant IXCs with *the option* of refraining from historical tariff filing requirements.

It is noteworthy that, in discussing the statutory language that ultimately was reflected in the Omnibus Budget Reconciliation Act of 1993 ("OBRA"),[8/] in which Congress amended Section 332 of the Communications Act to enable the Commission to apply a strikingly similar test for forbearance to providers of Commercial Mobile Radio Service ("CMRS"), the House Committee report observed that the "Commission may specify, for instance, [that] services need not be tariffed at all, or it may choose to subject such services to a policy of 'permissive detariffing'."[9/] The Commission itself considered a policy of permissive tariffing as within the realm of its authority, when implementing the forbearance provisions enacted by Congress under the OBRA.[10/]

[6/] Telecommunications Act at § 401 (adding § 10(a)) (emphasis added).

[7/] BLACK'S LAW DICTIONARY 644 (6TH ED. 1990).

[8/] Omnibus Reconciliation Act of 1993, Pub. L. No. 103-666, Title VI, § 6002(b)(2)(A)(iii), 107 Stat. 312, 392-93 (1993).

[9/] H.R. Rep. 103-111, 103d Cong., 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.A.N. 378, 587-88.

[10/] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252 at ¶ 178 (Feb. 3, 1994) ("*Second Report and Order*").

And the Commission clearly has supported the benefits of a permissive tariffing policy in the past, as the Commission enacted such a policy in the context of its *Fourth Report and Order* in the *Competitive Carrier Proceeding*, in which the Commission stated:

"We believe this Order promotes the public interest in efficient telecommunications services by removing costly regulatory burdens while maintaining adequate assurance of just and reasonable rates and service availability."[11/]

B. A Policy of Mandatory Detariffing Restricts Competition and is Adverse to the Public Interest

A policy of mandatory detariffing fails to meet the statutory prerequisites for forbearance because it is not consistent with the public interest. A policy of mandatory detariffing would retard competition (thereby frustrating the overarching pro-competitive goals of the Telecommunications Act) by raising transaction costs, reducing the ability of carriers to respond to competition, and reducing marketplace information about prices.

The presence of high transaction costs long has been recognized by economists as a source of market failure. Reduction of transaction costs in order to promote competition is a legitimate role of government and regulation.[12/] Transaction costs include the cost of informing consumers about the price, availability, features, etc. of a product or service, as well as the costs of forming a contract between buyers and sellers, specifying the terms and conditions of

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[11/] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 F.C.C. 2d 554, 582 ("*Fourth Report and Order*") (stating that "[c]arriers treated by forbearance as defined in this Order are given *permission* to cancel their tariffs on file with this Commission").

[12/] *See, e.g.*, D. F. SPULBER, REGULATION AND MARKETS, pp. 53-65 (1989).

the contract, and enforcing the contract.[13/]

Tariffs reduce transaction costs by acting as standardized contracts between IXCs and their customers. In lieu of tariffs, IXCs would have to employ a system of customer contracts with millions of customers, in which each contract specifies the prices, terms, conditions, rights and liabilities of customers and IXCs. For smaller IXCs, the transaction costs of developing, maintaining and tracking thousands of customer contracts may bar them from the market. In contrast, if smaller IXCs are allowed to file tariffs and to use those tariffs as standard-form contracts for customers, transaction costs are reduced and market entry and competition by smaller IXCs are encouraged. The result of a system in which tariff filings are prohibited will be to turn an increasingly competitive interexchange market into one dominated by a few large IXCs whose vast revenues can support an individualized contract tracking system and related marketing costs.

Certainly, in many markets, transactions occur without contracts. However, in telecommunications markets, unlike other markets, services are consumed (and obviously, cannot be returned) long before payment is rendered. The disconnect between rendering services and payment requires some form of "contract," such as a tariff, between customers and service providers.

Tariffs also allow carriers to be more responsive to the market. If a carrier has a single tariff that governs its relationship with thousands (or millions) of customers, it can quickly reduce its prices for all customers, or change its offerings to respond to the market. If it were forced to enter into and maintain individual customer contracts, a carrier's ability to quickly

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[13/] J. TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION, pp. 29-34 (1989), citing R. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), and O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTRITRUST IMPLICATIONS (1975).

change prices and respond to the market would be significantly restricted. Indeed, the transaction costs of changing millions of customer contracts would overwhelm all but the largest price changes. Said differently, a carrier readily will reduce its prices by 1¢ a minute to meet competition if such a reduction simply requires changing a tariff. However, a carrier will be reluctant to change its prices if such a change requires the renegotiation of millions of customer contracts. Without tariffs, customers may be locked into individual contracts, and forced to negotiate with each provider on an individual basis--an expensive, time-consuming and undesirable process.

Tariffs promote competition by providing market information about prices, terms and conditions. Publication of rates and terms enables consumers and competitors alike to compare the prices, products and services of alternative carriers. Enacting a mandatory detariffing policy will serve only to raise the search and information costs of determining market prices, products and services. Contrary to the Commission's theory that "[a] tariff filing requirement harms consumers by undermining the development of vigorous competition,"[14/] tariffs actually promote competition by promoting the free flow of market information regarding available prices, services and opportunities. Tariffs provide new entrants with basic competitive information about both market price and market opportunity. In a competitive market, all firms act as price takers, but obviously, firms cannot respond to the market price if information about that price is not readily available. As well, the presence of filed rates, terms and conditions of service enables consumers to make informed decisions about their choice of IXC.

Competitive markets typically are characterized by a mechanism that makes prices known to buyers and sellers. The stock market, for example, has a number of mechanisms by

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14/ *NPRM* at ¶ 29.

which stock prices are disclosed to buyers and sellers. Tariffs provide information about prices that competitors (sellers) can use to make basic economic decisions. Similarly, tariffs provide consumers with information about the range of prices and services offered in the market. While individual consumers rarely peruse tariffs filed with the Commission, there are many consumer organizations and competitors who do regularly examine public tariffs and distill them into consumer information and market plans.

II. PERMISSIVE TARIFF FILINGS ADVANCE THE PUBLIC INTEREST

Rather than prohibit carriers from filing tariffs, MFS recommends that the Commission adopt a policy of permissive tariffing that allows carriers the option of filing tariffs. Under such a policy, carriers could file tariffs as standard-form contracts to enable them to market to a broad base of consumers, while minimizing transaction costs. Carriers also could choose to enter into individual contracts with customers, where appropriate. A policy of permissive tariffing would promote competition by providing carriers with a range of alternatives for marketing their products to customers, supplying market information and reducing the administrative burdens on the Commission.

Given a choice, some firms will choose not to file tariffs, but instead, will interact with their customers on a contractual basis. This should reduce the millions of pages the Tariffs Division receives annually, yet yield the competitive benefits provided by tariffs.

A permissive tariffing policy is similar to the disclosure philosophies and policies of the Securities and Exchange Commission ("SEC"), which requires that companies file prospectuses describing relevant information about various public offerings. The SEC compels all companies

who wish to trade securities in interstate commerce to file a registration statement[15] with the SEC, including a prospectus containing full public disclosure of all anticipated service offerings.[16] The SEC does not directly regulate the prices of stocks or the terms and conditions of securities offerings, but instead, insists on full public disclosure of all material facts.[17] Likewise, the FCC could adopt a role similar to that of the SEC where the FCC acts as a centralized repository for such public filings and accepts tariffs, but forebears from directly regulating and reviewing the prices, terms and conditions contained in those tariffs. Instead, the Commission could insist that tariffs, if filed, must contain sufficient detail to reveal all material information about the services offered to the public.

In the NPRM, the Commission declared that the Telecommunication Act's objectives of just and reasonable rates "[c]an be achieved effectively through market forces and the administration of the complaint process."[18] The Commission previously has stated that tariffs are not essential to the Commission's ability to monitor carriers' rates, because the Commission has "other means to ensure [its] enforcement of mandates of the Act,"[19] including the Section

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[15] This registration statement contains information such as the nature of the business, the identity of the directors, capitalization, how investor funds are to be used, etc. 15 U.S.C. § 77g/77aa. The registration statements are made available to the public. 47 U.S.C. § 77f.

[16] 47 U.S.C. § 77e.

[17] Under 47 U.S.C. § 77w, neither the fact that the registration statement has been filed or is in effect, nor the fact that a stop order is not in effect shall be deemed a finding by the SEC that the registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed on the merits of, or given approval to, such security. The Commission also is without authority to approve a registration statement for a security filed pursuant to the Securities Act. *See Boruski v. Division of Corp. Finance of U.S. Securities and Exchange Comm'n*, 321 F. Supp. 1273, 1276 (S.D.N.Y. 1971).

[18] *NPRM* at ¶ 28.

[19] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 99 F.C.C. 2d 1020, 1029 (*"Sixth Report and Order"*).

208 complaint process, and because the Commission "[c]an remedy any irrational carrier conduct or aberrations that might occur . . . through the complaint process."[20/]

However, in the absence of demonstrative evidence of anticompetitive pricing practices or discriminatory service offerings, the Section 208 complaint process, which the Commission insists is sufficient to check carriers' abilities to charge unjust and unreasonable or discriminatory rates, is rendered ineffective. That is, if the Commission refuses to allow carriers to publish evidence of their rates, terms and conditions, neither consumers nor competitors nor the Commission will have readily available information with which to verify the pricing practices and terms offered by non-dominant IXCs

The FCC's complaint process will remain an effective check on carriers' compliance with the terms of the Telecommunications Act, even under a policy of permissive tariffing, because carriers will continue to have an incentive to file tariffs, in order to enable them to refer complaining consumers and competitors to their filed tariff provisions. This filing of tariffs also serves to lower those transaction costs associated with the enforcement and tracking of individualized customer contracts.

III. CONCLUSION

In a stated effort to establish a more market-based environment that will help to prevent anticompetitive practices and to protect consumers better, the Commission tentatively has concluded that it is in the public interest to prohibit non-dominant interexchange carriers from filing tariffs for domestic, interstate, interexchange services. While the Commission's goals are laudable, the Commission' view of the tariff filing as an anticompetitive practice is somewhat

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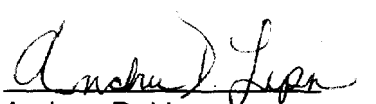
20/ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 91 F.C.C. 2d 59, 69 ("*Second Report and Order*").

shortsighted. The Commission's mandatory detariffing policy fails to take into account the fact that a system of permissive tariffing could replicate the positive characteristics of the current tariff filing system, such as providing the public with a centralized, verifiable location for the public disclosure of vital pricing and service information, while relieving the Commission of the excessive administrative burdens associated with the current system.

MFS respectfully submits that the permissive tariffing policy proposed herein will promote the overarching pro-competitive goals of the Telecommunications Act and, as such, should be implemented, rather than a policy of mandatory detariffing.

Respectfully submitted,



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